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No. 07- (1)

IN THE

# Supreme Court of the United States

TRUCK-RAIL HANDLING, INC. and
QUALITY TRANSPORT, INC.,

*Petitioners,*

*v.*

THE BURLINGTON NORTHERN and
SANTA FE RAILWAY COMPANY,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Whether a properly defined relevant market is necessary to prove a tying claim, either *per se* or rule of reason, under Section 1 of the Sherman Act?

Whether the decision below is contrary to this Court's decisions in *Northern Pacific Railroad Co. v. United States*, 356 U.S. 1 (1958), *Simpson v. Union Oil, Co.*, 377 U.S. 13 (1964), and *International Salt Co. v. United States*, 332 U.S. 392 (1947) in which this Court granted summary judgment in favor of the plaintiffs where the defendants had "tied" their leases to coerce independent businesses to abdicate their independent judgment regarding their prices and choices of products and services sold?

## PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The parties to the proceeding are the petitioners Truck-Rail Handling, Inc and Quality Transport, Inc., (plaintiffs below) both privately held companies and Burlington Northern Santa Fe Railway Company (defendant below).

Respondent Burlington Northern Santa Fe Railway Company is a publicly owned corporation.

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**Statute:**

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a-4a) is not reported. The decision of the District Court (App. 5a-44a) is unreported.

## JURISDICTION

The Court of Appeals entered its Opinion on July 13, 2007. The court denied a petition for panel rehearing and petition for rehearing en banc on August 24, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. Sec. 1, provides in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

## REASONS FOR GRANTING THE PETITION

This Court has frequently granted certiorari to decide whether particular restraints are properly analyzed as tying arrangements, either *per se* or rule of reason, and the proper test for determining economic power over the tying product. *Jefferson Parish Hosp. Dist No. 2 v. Hyde*, 466 U.S. 2 (1984) and *Eastman Kodak*

*Co. v. Image Tech. Servs. Inc.*, 504 U.S. 451 (1992). Yet the lower courts continue to struggle. *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698 (7th Cir 1984); *United States v. Microsoft Corp.*, 253 F.3d 34 (2001). As one commentator noted "The disconnect between the Supreme Court's and lower courts' decisions necessitate the Supreme Court to clarify this area of law." McMahon "Tying Law: The Clash Between the Supreme Court and Lower Courts" THE JOURNAL OF THE ANTITRUST AND UNFAIR COMPETITION LAW SECTION OF THE STATE BAR OF CALIFORNIA Vol. 16, No. 2, p. 95 (2007).

In this case respondent (defendant below) used its economic power over bulk rail terminals to coerce shippers to use respondents contracted bulk transloaders and carriers to the exclusion of plaintiffs in order to force bundled rates for point to point shipments.

The decision below is contrary to this Court's decisions in *Northern Pacific Railroad Co. v. United States*, 356 U.S. 1 (1958), *Simpson v. Union Oil, Co.*, 377 U.S. 13 (1964), and *International Salt Co. v. United States*, 332 U.S. 392 (1947) in which this Court granted summary judgment in favor of the plaintiffs where the defendants had "tied" their leases to coerce independent businesses to abdicate their independent judgment regarding their prices and choices of products and services sold.

## STATEMENT OF FACTS

### A. The Parties

#### 1. Truck-Rail Handling and Quality Transport

TRH is a transloader – it transfers bulk lading from tanker railcars into trucks, which are then delivered to end receivers.[1] TRH deals exclusively in "bulk" commodities, which can be in liquid or dry form. 1 ER 18, 2 ER 393.

Bulk transloading requires unique vacuum and pneumatic equipment to "pump" lading from a tanker railcar into a truck tanker. 1 ER 18. TRH's owner and president Al Schorno pioneered the bulk transloading industry and in the 1970's invented the specialized equipment that is now standard in the industry. 1 ER 18, Expert Report of William Tye at 5.

TRH is also a specialized vendor in that it is capable of handling hazardous materials, which require special employee training, government testing of operators, and licensing issued by local, state, and federal authorities regulating the handling of hazardous materials. 1 ER 19.

QTI is a trucking (also called "drayage") company that works in tandem with TRH. After materials are transferred from the railcar to truck, QTI delivers lading a short distance to the product's end receiver, where it unloads the lading using the same specialized equipment described above. All of QTI's trucks are specially designed tanker

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[1] Unless specifically differentiated, the term "transload" will refer not just to the transfer of lading to truck from rail, but to the trucking, storage and other ancillary services performed by "transload operators."

trucks with built-in vacuum hoses and pneumatic pumps. 1 ER 19. Like TRH employees, QTI's drivers must be specially trained and licensed by the government to handle hazardous material. 1 ER 19.

(Throughout the record, TRH and QTI are commonly referred to jointly as "TRH." For consistency with the record, this brief will use "TRH" to mean both TRH and QTI, unless otherwise noted.)

**2. Burlington Northern Santa Fe Railway, Co.**

BNSF operates one of the largest railroad networks in North America, with about 33,500 route miles covering 28 states. First Amended Complaint ("FAC") at ¶16; Amended Answer ("Answer") at ¶16. In the United States, there are seven "Class I" railroads, defined as those railroads with annual revenues exceeding $250 Million. 2 ER 518. The Union Pacific Railroad ("UP") is the largest Class I railroad, with annual revenues of over $10.5 Billion. 2 ER 518. BNSF is the second largest Class I freight railway in the United States, with revenues approximating $9.5 Billion. 2 ER 518; Answer at ¶16.

Together, the UP and BNSF control roughly 93% of the freight rail market in the whole of the western United States, with approximately 50% and 43%, respectively. 2 ER 519.

BNSF is the product of a 1996 merger between Burlington Northern Railroad Company and the Atchison Topeka & Santa Fe Railway Company.

## B. BNSF's Power Over Transload Terminals

A transloading terminal consists of land and railroad tracks adjacent to, or a short distance from, the main train tracks. FAC at ¶10; Answer at ¶10. As a result, the universe of available facility locations is strictly limited. Furthermore, the facilities must possess certain characteristics as required by law to permit the safe loading and unloading of dry and liquid, hazardous and non-hazardous materials. 1 ER 27-28. It is not disputed that in order to provide transloading services to their customers, transloaders require a terminal site. 3 ER 557.

Before the activities which gave rise to this lawsuit, TRH and QTI operated on BNSF's transload facilities in El Paso, Texas and Littleton, Colorado, among other places. 1 ER 19. TRH was the first operator to transload bulk commodities at BNSF's Littleton facility, well before the 1996 merger, and is responsible for having attracted most of BNSF's current business there.

The El Paso market consists of four terminal sites named for their township: Mesilla Park, New Mexico; Vado, New Mexico; Anthony, Texas; and Vinton, Texas. 2 ER 261. All four of these facilities are owned by BNSF. 2 ER 261. Despite extended efforts by TRH to find other facilities – or land where a new facility could be built – there are no other available terminal sites within at least a 50-mile radius of El Paso. 1 ER 35. BNSF has acknowledged this fact. 1 ER 84, 1 ER 178, 1 ER 184, 1 ER 244. The closest transload operator outside of El Paso is located 250 miles away in Albuquerque, New Mexico. 3 ER 676.

The other market at issue here is Littleton, Colorado, a suburb of Denver. BNSF owns a large transload terminal in Littleton nicknamed "Big Lift." TRH performed an exhaustive search for alternative facilities in and around Denver, but was unable to find any alternatives. 1 ER 34-35. The only other facility TRH was able to find was a site owned by BNSF's competitor Union Pacific, which also denied TRH access. 1 ER 35. UP's next closest facility is located over 250 miles away, well beyond the regional market served by Big Lift. 2 ER 457.

As a result of the restricted supply of terminals in these geographic markets, BNSF owns and controls the only available transload facilities in the greater El Paso and Denver areas. BNSF used its power over these facilities, essential to transloaders' operations, to force transload operators to submit to onerous conditions.

### C. BNSF's Transload Strategy

After the 1996 merger creating BNSF, the Railroad began developing a Transload Strategy, hatched at the highest corporate level through the participation of half a dozen BNSF Vice Presidents, including its Chief Marketing Officer. 1 ER 148-171[2]. The basic tenets of this strategy were to use the substantial power over transload terminals (and therefore transload operators)

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[2] 1 ER 148 is a presentation outlining the Transload Strategy, and the handwritten "attendance list," includes "Chuck [Schultz]," (BNSF's Chief Marketing Officer) and vice presidents "Pete R[ickershauser]," "Dave G[arin]," and "Steve Branscum," among others. In February, 2003, TRH moved to take the deposition of Mr. Schultz, which the lower court denied.

to (1) monopolize transloading markets and (2) increase the prices of both its own rail service as well transloading services, from which it collected profits.

The goals of the Transload Strategy were to be "accomplished by *gaining control over all aspects of moving door to door* . . . via BNSF," *i.e.* from the shipper's origin to the end receiver, including the intervening transload markets. 1 ER 152 (emphasis added).

These objectives – controlling transload markets and their pricing – were implemented in two ways.

First, BNSF planned to monopolize the transload markets by using its power over the terminals to implement a plan to "consolidate" transload operators. 1 ER 165. The consolidation plan was based on the premise that "BNSF does not intend to have multiple facility-operator agreements within the same immediate market area." 1 ER 80.

Second, once consolidated, the Railroad sought to both "control" and "*coordinate*" transload prices in an effort to "standardize transload rates." 1 ER 165; 2 ER 364. The "Mission Statement" of the group in charge of transloading operations was to be accomplished by "establish[ing transload] rates and terms of service." 2 ER 384. It also sought to "develop [a] transload pricing scheme." 1 ER 241.

One of the first markets the Railroad targeted was "bulk chemical" commodities (1 ER 168), resulting in one vice president's stated objective to "*Exploit* the Dry and

Liquid Bulk Truck Market." 2 ER 369. This case only involves the transportation of bulk commodities.

BNSF sought to "control" transload prices through the use of "bundled prices," which include the price of rail, transload, and trucking services packaged to the shipper as one price. *Compare* 2 ER 259, 260.

The tool the Railroad used to implement the bundled pricing program was a document called the Transload Service Agreement ("TSA"). As will be shown, execution of the TSA was not voluntary. Rather, it was forced on transloaders through the Railroad's substantial market power over the transloaders' main supply – the transload terminals.

### 1. Transload Service Agreement[3]

BNSF's rationale behind the TSA is that it "allows BNSF not [the transloader] to manage more of the volume of business that moves through [a] facility through bundled pricing program. . . ." 1 ER 73.

The TSA had the effect of requiring that the transloader (1) bundle its services along with BNSF's rail service; (2) abdicate its pricing authority to the Railroad; and (3) agree not to compete against the bundled package by offering its services "unbundled" at a lower price.

---

[3] The Transload Service Agreement has also been called the Distribution Services Agreement ("DSA"), and the Transload Storage Drayage Agreement ("TSD"). For clarity, it will be referred to throughout as the "TSA." The material components of the agreement remained the same throughout the name changes. *See, e.g.* 1 ER 86; 2 ER 273.

First, the TSA requires a transloader to bundle its services. 2 ER 273, 275-276.[4] BNSF's director testified he "[could] not think of a TSA that did not include bundled pricing." 2 ER 496. Failure on the part of the transloader to bundle prices constitutes a material breach of the contract, resulting in its cancellation. 2 ER 282[5]. Cancellation of the TSA also worked to terminate the transload terminal lease. 1 ER 106.[6]

---

[4] Section 1(c) of the TSA states, "Railroad Company will pay Operator for services under the Agreement related to commodities that travel under a Bundled Rail Authority." Section 2 of the TSA states, "Operator shall provide the following services and equipment to Railroad Company . . ." which includes transload, storage and drayage services.

[5] Section 8(b) of the TSA states, "Either party may terminate this Agreement following a material breach or default by the other party, by giving the other party no less than thirty (30) days written notice of termination."

[6] Section 1 of the terminal lease states in relevant part,

> "This Lease shall commence on September 1, 1998, and shall continue in effect for a term of thirty (30) days from and after such date. Upon conclusion of such thirty (30) day term the Lease shall automatically be renewed for successive thirty (30) day terms unless and until Lessor provides fifteen (15) days' advance written notice that Lessor does not intend to renew for the following period. Notwithstanding the foregoing term provision, in the event a Distribution Services Agreement is executed by and between Lessor and Lessee during the pendency of this Lease, the term hereof shall be automatically extended to a term of five (5) years from the commencement date of September 1, 1998, *or for a term expiring upon termination of the Distribution Services Agreement*, whichever event occurs first. . . ."

(emphasis added).

Second, the prices at which the transloader's services were sold under the bundle were contained within the TSA. 2 ER 276-277.[7] BNSF's various directors of Distribution Services testified or otherwise indicated that BNSF maintained the power to "veto," "reject," or otherwise control the prices in the TSA. BNSF director Skip Kalb testified:

> Q. For a bundled rate. When you're doing the bundled packet, you can veto the price suggested by the transloader for the transloading price part of it. Is that right?
>
> A. Yes.

2 ER 484.

Jack Looney, a previous director of Distribution Services testified:

> Q. Okay. But if you – if you wanted to – If they – if they suggested a price –
>
> A. Um-hum.
>
> Q. And you didn't want to go along with it, you wouldn't agree to it –
>
> A. (Witness nods.)

---

[7] Section 3 of the TSA states, "Railroad Company shall pay Operator in accordance with the rates contained in Schedule A for the categories of service described in this Agreement for those commodities that travel under Bundled Rate Authorities."

> Q. – then you could reject that price; couldn't you?
>
> A. If – if – if, in fact, we didn't feel that it was going to work in the market place, we could reject it. . . .

2 ER 548-549. In one instance, a director wrote that "he needed to discuss" a transloader's proposed price change because he "[had] an issue with [it]." 1 ER 230.

If a transloader refused to agree to the Railroad's price, the TSA would not be executed, resulting in automatic termination of the terminal lease. 2 ER 549, 1 ER 106. Because BNSF exercised power over the terminals in any given market, termination of the lease led to ultimate exclusion from the market. The inevitable conclusion to be drawn is that transloaders had to agree to whatever price the Railroad dictated.

Third, the TSA was used to prevent transloaders from offering its "unbundled" services at prices lower than the bundled services, thereby preventing price competition against the bundle. Thus, both co-conspirators Stagecoach and Savage – once they replaced TRH and other transloaders via "consolidation" plans – *agreed* to this restriction. Stagecoach admitted:

> Q. Did you ever assure Mr. Kalb that your rates were valid on either a bundled or unbundled basis?
>
> A. I think I may have mentioned that to him, yes.

2 ER 499.

Savage also agreed to this restriction:

> Q. But I mean, the pricing that you submitted in the transload agreement, was that supposed to cover the prices that you would be charging for bundled and for unbundled?
>
> [Witness counsel: Do you understand the question?]
>
> A. Yes, I do. And I would say, yes, for what we knew at the time.

3 ER 684.

BNSF testified that the parties agreed to fix the prices:

> Q. And is it true that [Stagecoach] assured you that his rates were valid on either a bundled or unbundled basis?
>
> A. Yes.

2 ER 487.

Moreover, these agreements were to be covered under the TSA. 2 ER 312.

This *per se* price-fixing agreement destroyed whatever competition was left in these markets by preventing the TSA-holder from competing against the BNSF bundle on price.

## 2. Bundled Pricing

Ultimately, the purpose of bundling prices was to secretly hide price increases into BNSF's rail services. For the shipment of Chemical Products – the only product at issue in this lawsuit[8] – the record shows that shippers paid 1.8¢ per revenue-ton-mile for bundled services, but only 1.6¢ per revenue-ton-mile for unbundled services – a price difference of 11%.[9] 2 ER 375-376[10].

It is for that reason that BNSF's director testified that the ultimate goal of "rationalization"[11] was to raise rates:

> Q. And you've testified that eventually the purpose of this rationalization would be to adjust the rates into these transload facilities, and that would be increasing revenues; is that correct?
>
> A. That was the direction I was headed, yes.

2 ER 521.

[8] All of the products at issue in this lawsuit fall under BNSF's "Chemical Products" category which includes plastics. 2 ER 373. In Denver and El Paso, TRH only handled plastics and other chemicals. 1 ER 180, 2 ER 310.

[9] "Revenue per ton mile [] is a useful surrogate for railroad rates." 1 ER 143.

[10] In 1999, the shipment of "bundled" chemical products yielded $10,338,000 in net revenue on 586,465,000 Revenue Ton Miles (RTM). The shipment of "unbundled" Chemical Products yielded $17,400,000 in net revenue on 1,103,038,000 RTM. 2 ER 375-376. Net revenue, divided by RTM equals "revenue per ton-mile."

[11] "Rationalization" is the Railroad's term describing the Transload Strategy. *See, e.g.* 2 ER 369.

That was the way the Railroad was headed as well. From 1998 to 1999, for example, the Railroad set the goal of increasing bundled price revenues by 10%. 1 ER 159. From 2000 to 2003, in one of the markets at issue in this case, BNSF was able to increase the percentage of shippers moving under bundled prices from 0% to 54%. 1 ER 218; 1 ER 51.

But, shippers dislike bundling prices. They prefer to work directly with the transloader since it gives them better service and better prices. BNSF's largest shipper in El Paso and Denver testified:

> A. Primarily we want to manage our relationships with our suppliers directly.
>
> Q. Why?
>
> A. If we have problems or issues, then we have a relationship that was can discuss with them. If there's opportunities, we can work directly with them.
>
> Q. You have – you don't have that if you have a bundled price from the railroad?
>
> A. Possibly.
>
> Q. But you prefer the other? You prefer to deal directly with your suppliers, as you say?
>
> A. We prefer to deal with our bulk-truck carriers directly.

2 ER 477.

Shippers also prefer to work directly with transloaders because they can negotiate better rates:

> Q. Does the price have anything to do with it?
>
> A. Anything to do with what?
>
> Q. With your preferences to deal directly with the transloader or trucker, than to go through the railroad with a bundled price.
>
> A. Our preferences would be that if we're working with the bulk-truck carrier, we can probably manage pricing better with them as the transloader.

2 ER 480. These preferences are industry wide. Stagecoach, for instance, testified that *none* of the customers it deals with have ever asked for a bundled price:

> Q. Did any of the customers, or have any of the customers complained to you that they wanted just one price, rather than a price from you and a ... price from BNSF?
>
> A. None of the customers that I'm dealing with have mentioned that to me.

2 ER 500. Stagecoach further explained that

> A. . . . I believe that customers are more sophisticated . . . and – with some of their

> traffic departments. They're much more able to effect a better price dealing directly with . . . the local party, who's going to be doing the business, rather than getting one price.
>
> So my – my opinion is, if they break their . . . total transportation cost up into two or three pieces, they're going to get a more effective price than they would if they go through and just get one price all the way to the consignee.

2 ER 501-502.

### 3. Terminal Lease Leverage

BNSF openly used coercion and threats of lease cancellations to implement its Transload Strategy by forcing transloaders to sign the burdensome TSA. Thus, BNSF explicitly "tied" execution of the TSA to the terminal lease:

> *It has been our position that completion of a TSA with BNSF has been and is still tied to the Vado-Vinton and other leases.* . . . [W]e are initiat[ing] action to provide the fifteen (15) days written notice not to renew leases with your company effective no later than December 31, 1998. *This account failure to reach agreement on the TSA.* . . .

1 ER 139 (emphasis added). In handwritten notes of one meeting with the Railroad, TRH's president Al Schorno

took special notice of this force, noting the "surreal threats that if we did not sign contracts we would be forced to move." 1 ER 96. Mr. Schorno knew these threats were credible. When TRH initially balked at signing the TSA, concerned it would allow BNSF "to control the areas that I can do business in," two of TRH's temporary leases were terminated. 1 ER 103, 1 ER 118.

Nor was BNSF's leverage limited to threats in one geographic market. In late 1999 BNSF director Dave Thomson wrote in an email, "I am in El Paso today to talk with Truck Rail about all their lease issues. If we do not come out of this meeting with an agreement about track leases . . . *they will not be on BNSF by end of year. This includes locations in Denver and Tacoma.*" 1 ER 178 (emphasis added).

Even more startling, Mr. Thomson admitted in deposition that BNSF used its power over transloading terminals to "leverage" operators into submission:

> A. . . . If we couldn't get improvements in one area – how do we get improvements in one area without having some leverage in another area to force those improvements?
>
> * * *
>
> Q. And the leverage in the other area was the fact that BNSF could terminate the Tacoma lease?

A. The fact that Truck-Rail Handling wanted to lease additional property in Tacoma was tied to resolving issues in El Paso and resolving issues in Denver.

2 ER 525.

BNSF threatened to, and ultimately did, interfere with TRH by actually refusing it train service. At one point, the Railroad issued a directive to its Denver Trainmaster that "... no cars of fly ash, or any other similar bulk product will be spotted at [TRH's] location.... This posture will be maintained by BNSF until such time as several outstanding issues that exist at Vado, NM; Big Lift, CO; and a California location have been fully and totally resolved between BNSF and T-R." 1 ER 174.

Neither was this coercive conduct limited to targeting TRH; other transloaders were similarly forced. In late 2000, BNSF told transloader Warehouse Specialists, that "If you are now willing to sign a lease with BNSF, then the lease paper work and TSD Agreement forwarded to you must be signed and faxed back to this office...." 1 ER 229. When Warehouse Specialists balked at signing the TSA, like TRH, Mr. Thomson suggested internally that a "full court press on WSI to sign a lease with BNSF" might make them "come to the table. *This is especially true if we tie the other locations where WSI is on the BNSF, LA, Phoenix, Portland in to the mix....*" 1 ER 225 (emphasis added).

## D. Denver Transload Strategy: "Operator Consolidation Plan"

In March 1999, BNSF targeted the Big Lift facility to become the "premier transload site in Denver," and Vice President Peter Rickershauser (an original creator of the Transload Strategy), sought to "commit its use" to traffic generating the highest profit.[12] Mr. Rickerhauser then tasked David Thomson with correcting "the problem that there were multiple operators on the Big Lift facility." 2 ER 526. In May, 2000, BNSF began rolling out its Transload Strategy through discussions with Savage to take over BNSF's sole operation in Denver. 1 ER 180-183. The resulting "Operator Consolidation Plan" called for the cancellation of five of the eight then-current leases. 1 ER 181. The remaining three leases either did not include rail track or would be cancelled at a later date.[13]

In October, 2000, pursuant to the Operator Consolidation Plan, all five transload operator leases, including TRH's, were cancelled. 1 ER 181, 217. QTI was permitted to pick up lading at Big Lift, but only for a very limited number of loads and for a fee that greatly increased its costs and therefore its ability to compete. 1 ER 188. Shippers using Big Lift were notified by BNSF that "Savage Industries will now coordinate all

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[12] Plaintiffs' Evidence in Support of Opposition to Summary Judgment, Ex. 33.

[13] One of these three leases was with Warehouse Specialists, which BNSF planned to "force into a lease for land only." 1 ER 181. As noted, BNSF required Warehouse Specialists to sign a TSA as a condition to leasing the land. 1 ER 216, 229.

transloading at Big Lift, CO. Any information to the contrary is erroneous." 1 ER 217.

Shippers were disgruntled. Safety Kleen testified that it preferred TRH over Savage because TRH's services and prices were better. 3 ER 690. Moreover, it lost the right to choose its own transload operator:

> Q. Did you understand that you had a choice to choose between Savage and Truck-Rail Handling?
>
> A. That wasn't the way the phone call came across.
>
> Q. How did the phone call come across?
>
> A. That I was going to be dealing with them and that was it.

2 ER 534.

Georgia-Pacific, a major customer of Warehouse Specialists, complained to BNSF on two separate occasions, "We have not heard from the Savage people nor do we really want to. [Our customer] is very happy with the service and pricing provided by WSI." 3 ER 616, 617. Shippers were "required to use the new operator." 1 ER 214, 215. Savage itself testified that some shippers "did not want to transition to us." 3 ER 685. But shippers had no choice to change transload facilities, partly because a majority of the shippers using Big Lift were "locked in" to long-term contracts requiring them to ship on BNSF's rails. 1 ER 218, 3 ER 596 (3-year requirements contract). Therefore, they had no opportunity to switch transload operations.

Before the "consolidation," all shipping business had been unbundled. 1 ER 218. But, once competition at Big Lift was eliminated through the consolidation, BNSF started converting all shipping business to bundled prices, per the Transload Strategy. 2 ER 529. In the two years that followed, the Railroad successfully converted 56% of the traffic to bundled prices. 1 ER 51.

Also according to strategy, Savage agreed to execute the TSA, giving BNSF power over all transloading prices in the market. 3 ER 628-632; 1 ER 182. Refusal to sign the TSA would have terminated Savage's Big Lift lease. 1 ER 189.[14] Savage also agreed not to compete against the new bundled services by promising not to offer lower, competitive un-bundled prices. 3 ER 684.

Then, with the monopoly secured, BNSF raised transload rates.

The cost of transloading increased by $100 per railcar. 1 ER 217, 3 ER 642, 2 ER 527 ("The fact is, we did raise the per car charge in Big Lift. . . ."). For some, this amounted to a price increase of more than 50%. 1 ER 214. The cost of transloading some products went from $0.27cwt[15] to $0.40cwt – a 48% price increase. *Compare* 3 ER 622, 634. In some cases, the cost of

[14] Section 1(c) of Savage's lease reads: "This Lease is made joint with the Burlington Northern and Santa Fe railway Company Transload Storage Drayage Agreement (TSD 3061). This Lease will be cancelled if the TSD 3061 is in default or canceled and vice versa."

[15] "Cwt" stands for "hundred weight," or the cost of handling 100 pounds of material.

storage went from $0.03cwt to $0.075 – a price hike of 150%. *Compare* 3 ER 622, 635. TRH's old customers saw their storage fees more than double. *Compare* 2 ER 536, 3 ER 642.

The Railroad forced these price increases on customers by threatening to halt shipments of any who refused to pay them. 1 ER 218.

BNSF shared in the revenues created by the price hikes. 1 ER 242, 2 ER 358. Revenue sharing from transload services was part of the overall Transload Strategy. 2 ER 355. More importantly, the Railroad was collecting even greater revenue through the price increases in rail it was able to hide in the bundled price, as detailed above.

Not only did the prices increase after the consolidation, the service level declined. 3 ER 689. These service drops were not temporary. A full year after the Consolidation Plan was implemented, one of BNSF's customers complained:

> I thought the whole purpose of having one company run this facility is to make things easier, so more rail movements can occur – this whole fiasco is having just the opposite effect!

1 ER 246.

In BNSF's eyes, however, the Consolidation Plan worked so well it was assimilated as a "best practices" blueprint into the Railroad's overall Transload Strategy. 1 ER 241. It had succeeded in consolidating the market

by eliminating competing transload competition, converting business to bundled prices, increasing transloading rates, sharing in the revenues, increasing its rail prices, and preventing Savage, the only remaining operator, from competing with the bundle by offering a lower-priced un-bundled alternative.

In early 2001, after TRH's lease in Big Lift was cancelled, it filed a Complaint in Colorado State Court alleging the "Operator Consolidation Plan" violated Colorado's antitrust laws. That claim was later refilled in federal court as the current action.

### E. Transload Strategy in El Paso: Consolidate and Monopolize

With the success of the "consolidation plan" in Denver, the Railroad aimed its sights at El Paso.

In El Paso for the decade from 1992 to 2002 – the year TRH was eventually excluded from the El Paso market – competition between TRH and Stagecoach was vigorous, with the two companies fighting for the same market customers on aggressive price competition. 2 ER 248-249. But, by August, 2001 BNSF had decided to terminate TRH's four El Paso leases because it had earlier balked at signing the TSA. 1 ER 239, 1 ER 254[16].

Cognizant of the antitrust lawsuit TRH had filed against it in Colorado, BNSF pledged to "be very intentional in how we act on [TRH's termination in El

[16] "Has BNSF done its due diligence with [TRH]? . . . I know our issues in the [El Paso] area pre-date Dave Thomson. . . ."

Paso]." 1 ER 254. With this in mind, BNSF's director of Distribution Services met with the legal department in December, 2001, the result of which was that BNSF prepared a Request for Proposal ("RFP") for the "El Paso Transload." 1 ER 255, 257; 2 ER 259-308.

The Request for Proposal was sent to seven transloaders, including co-conspirators Stagecoach and Savage. 1 ER 258. TRH was expressly not permitted to bid on the facilities. 1 ER 253.

Although the Railroad, in light of the antitrust lawsuit pending in Colorado, tried to disguise execution of its Transload Strategy in El Paso as a "competitive" bidding process, all of the essential elements of the Railroad's Transload Strategy were present.

First, since the RFP included all four of BNSF's El Paso transload facilities, it was clear that the Railroad intended to "consolidate" the entire market under one transload operator. 2 ER 261. At the time the RFP was issued, there were no available transload terminals in El Paso, which meant that no competing operators would have the ability to enter and "de-consolidate" the market. Moreover, the RFP called for all four transload terminals to be "closed," meaning the winning bidder could – and eventually did – exclude competitor access. 2 ER 313, 504-506.

Second, once the market was consolidated under a single operator, BNSF intended to convert the existing business from an un-bundled to a bundled basis. All shipping business moving into El Paso before the RFP was issued, was un-bundled. 1 ER 257. However, the

RFP required that the winning bidder sign the TSA, mandating the winning bidder to bundle prices. 2 ER 263.[17] The evidence shows that the Railroad intended to "convert" the business to bundled pricing. 1 ER 257,[18] 2 ER 312.[19]

Third, because the installed transload operator was required to execute a TSA, the Railroad would have ultimate control over transloading prices, for reasons fully explained above.

Finally, the new transload operator had to agree not to compete against the bundled price by offering a lower, more competitive price for unbundled services. Stagecoach agreed. 2 ER 312, 487, 499.

In January, 2002, BNSF terminated all four of TRH's El Paso leases 2 ER 309.

In February, 2002, Stagecoach was "awarded" the contracts and signed the leases on the four transload terminals, making it "the only bulk transloader on either the BNSF or the UP."[20] 2 ER 320.

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[17] "The successful bidder must sign BNSF's Transload Storage Drayage Agreement (TSD), in the form attached as Enclosure (D). * * * The successful bidder must sign BNSF's Standard Lease of Land, as well as Lease of Track, in the form attached as Enclosures (E) and (F), respectively."

[18] "While we realize that these moves are unbundled *at this point*, we designed the RFP to see how much information we get back." (emphasis added)

[19] Internal email discussing "convert[ing] non-bundled biz."

[20] Plaintiffs' Evidence in Opposition to Summary Judgment, Ex. 92.

Shipper Safety Kleen lost the ability to choose its own transloader:

> Q. Did you have any – did you have any say in what transload operator would be used for – to service Safety Kleen in the [El Paso] area after Truck-Rail Handling was – after Truck-Rail Handling was changed out?
>
> A. None whatsoever.

2 ER 538-539. Because there were no alternative facilities in the market, Safety Kleen had no choice but to useBNSF/Stagecoach. 2 ER 537-538.

BNSF's own astonishing acknowledgment was that

> [C]ustomers are now 'locked in' to BNSF Stagecoach (based on being locked in to a current transportation contract/volume commitment to us), without any flexibility to test their economics.

2 ER 312.

A member of BNSF's Distribution Services group commented that

> My only concerns with Stagecoach were 1) the 'monopoly' this gives them in the marketplace. . . .

2 ER 314.

Immediately upon its termination, TRH began searching for alternate locations where it could continue to serve its customers. Although no functioning transload terminals were available in El Paso, TRH found dilapidated track on land owned by Santa Fe Mining Company in Las Cruces, New Mexico, which Santa Fe Mining had agreed to rehabilitate for TRH's use. Santa Fe Mining was prepared to allow TRH to transload hazardous materials there. 2 ER 472.

When Mr. Kalb first learned of TRH's potential new site, he wrote "[w]e have gone to a lot of work on the El Paso RFP and want to control future transloaders on our property. I hope this information is incorrect." 2 ER 316.

Later, Santa Fe Mining approached BNSF about servicing the new TRH facility. 2 ER 353. The El Paso Trainmaster replied, "Need to make sure that the new [transloader] is Stagecoach. Quality Transport or Truck-Rail Handling are no longer able to operate on the BNSF." *Id.* When Mr. Kalb was contacted again, he responded, "[w]e recently made a strategic business decision to discontinue TRH/Quality Transport as our transloader in this area." *Id.* Emphasizing BNSF's intention to insulate the BNSF/Stagecoach monopoly, Mr. Kalb continued:

> We do not plan to add this company(ies) *or any others* to Stagecoach which won the Transload RFP bid process to handle our transloading in the greater El Paso area.

*Id.*

In June, 2002, Mr. Kalb telephoned the president of Santa Fe Mining directly and told him to put a stop to building TRH's new facility. Recalling that telephone call, Santa Fe Mining's president testified:

> Q. Okay. Was it your understanding that BNSF made a decision to support Stagecoach rather than TRH?
>
> A. It is my understanding, from the conversation, that Skip Kalb was advising me that someone within BNSF had made a decision, four months previous to this conversation, to, in his words, support Stagecoach, rather than TRH.
>
> Q. Okay. Did you understand Mr. Kalb to be saying that BNSF was only going to allow Stagecoach to transload in this area?
>
> A. My impression, and this is fairly vivid – was that the BN – Mr. Kalb was advising me that the BNSF had made a decision to support Stagecoach, to the exclusion of Truck-Rail Handling. That was my personal impression.
>
> Q. So you understood that Stagecoach was the exclusive transloader in this area?
>
> A. Yes. In fact – although I don't recall the words being said, it indicated an exclusive arrangement or contract for this particular business. That's exactly what I understood the objection of BNSF to be.

2 ER 469-470.

In mid-2002, TRH mitigated its damages and leased the inadequate substitute facility served by the Union Pacific in El Paso. Although TRH was able to bring some of its customers with it to the UP, it was unable to compete for two-thirds of the market, which was "locked in" to BNSF by long-term rail shipment contracts. 1 ER 218,239; 3 ER 595-599. Nor was it able to compete for those shippers that required hazardous materials, which could not be handled at the UP facility. 2 ER 58-59.

## ARGUMENT

First, the need to define relevant market in an antitrust case is obviated by a showing of anticompetitive effects. In this case, the Railroad used its power over the transload terminal sites to force transload operators to bundle their services with rail services. Prior to the illegal acts here, 0% of shippers bundled prices in the Littleton, Colorado market in 2000. Once the Railroad enacted its policy, however, it was able to "convert" over 56% of the shipments from the Colorado terminal to bundled pricing by 2003. 1 ER 218, 51. The record shows that, once enacted, the bundled pricing policy allowed the Railroad to hide rail-price increases to the shipper within the bundle. This price increase amounted to a difference of 11%.

In discussing the *Northern Pacific* case, Professor Gellhorn and Commissioner Kovacic wrote:

> One possible explanation for the challenged tie-in was that [Northern Pacific] was using the device to avoid price controls imposed by the ICC on freight transportation. Later decisions have treated the use of tying to evade price controls or other forms of regulation as an important rationale for finding liability.

(*Antitrust Law and Economics*, Gellhorn & Kovacic (5th Ed. 2004), p. 386, *citing*, *Litton Systems, Inc. v. American Tel. & Tel. Co.*, 700 F.2d 785 (2nd Cir. 1983), *Sandoz Pharmaceuticals Corp.*, 111 F.T.C. 625 (1992).

Second, the Lower Court's decision is contrary to this Court's decisions in *Northern Pacific*, *Simpson*, and *International Salt* in that the undisputed facts demonstrate that the Railroad used leases over transload terminals as leverage to compel TRH to abdicate its freedom to price and to deal with its own customers in accordance with its own business judgment.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JULY 13, 2007**

**UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

No. 05-16552

D.C. No. CV-03-02825-JSW

TRUCK-RAIL HANDLING, INC.;
QUALITY TRANSPORT, INC.,

Plaintiffs - Appellants,

V.

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of California;
Jeffrey S. White, District Judge, Presiding

Argued and Submitted June 12, 2007
San Francisco, California

Before SCHROEDER, Chief Circuit Judge, CANBY and FERNANDEZ, Circuit Judges.

*Appendix A*

## MEMORANDUM*

Truck-Rail Handling, Inc. and Quality Transport, Inc. (collectively, "TRH") appeal from the district court's summary judgment of TRH's allegations that Burlington Northern & Santa Fe Railway Co. ("BNSF") violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, by requiring transload operators to sign a Transload Service Agreement ("TSA") as a condition of leasing transload terminals from BNSF. We have jurisdiction under 28 U.S.C. § 1291. We review *de novo* the grant of summary judgment, *Oliver v. Keller,* 289 F.3d 623, 626 (9th Cir.2002), and we affirm. Because the parties are familiar with the factual and procedural history of this case, we need not recount it here.

Summary judgment was properly granted on TRH's Section 1 *per se* price-fixing claim because, whether the alleged restraint is horizontal or vertical, TRH has presented insufficient evidence to support its theory that BNSF dictated the rates that TSA transloaders could charge for their services. *See Chisholm Bros. Farm Equip. Co. v. Int'l Harvester Co.,* 498 F.2d 1137, 1142 (9th Cir.1974) ("The crux of any price-fixing agreement is the relinquishment by a trader . . . of the freedom to set prices in accordance with his own judgment.").

The district court properly granted summary judgment in favor of BNSF on TRH's *per se* tying claim,

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

its Rule of Reason claims under Section 1, and its Section 2 monopolization and attempted monopolization claims because TRH failed properly to define the relevant product markets. TRH contends that the relevant tying market consists of "BNSF transload terminals" and that the relevant tied market is confined to "transload services provided to BNSF shippers." These proposed product markets are unduly narrow and are not defined from the perspective of the end consumer, as the cases require. *See, e.g., Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd.*, 924 F.2d 1484, 1489 n. 4 (9th Cir.1991). Here, the consumer is the long-distance shipper of bulk cargo.

Summary judgment was properly granted on TRH's Section 2 conspiracy to monopolize claim because the evidence adduced does not permit an inference that BNSF possessed the required "specific intent" to conspire with TSA transloaders to achieve the asserted goal of the conspiracy (to confer upon TSA transloaders a monopoly over BNSF transload terminals). *See Paladin Assocs., Inc. v. Montana Power Co.*, 328 F.3d 1145, 1158 (9th Cir.2003) (stating elements of Section 2 conspiracy to monopolize claim). It is simply not reasonable to infer that BNSF would conspire to provide TSA transloaders with monopoly power over BNSF transload terminals when the logical result of such a monopoly would be an increase in transloading rates (and a corresponding increase in the bundled rate that BNSF offers its own customers). Summary judgment was also

appropriate because TRH failed to adduce evidence of an anticompetitive act.

The judgment of the district court is

**AFFIRMED.**

## APPENDIX B — ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT FILED MARCH 8, 2005

**IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA**

No. C 02-02825 JSW

TRUCK-RAIL HANDLING INC, and QUALITY TRANSPORT, INC.

Plaintiffs,

v.

THE BNSF RAILWAY COMPANY,

Defendant.

**ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

### I. INTRODUCTION

Presently before the Court are Defendant's motion for summary judgment and Plaintiffs' motion for partial summary judgment. Having considered the parties'

papers, relevant legal authority, and having had the benefit of oral argument, the Court GRANTS IN PART and DENIES IN PART Plaintiffs' motion for partial summary judgment. The Court GRANTS Defendant's motion for summary judgment.

## II. PROCEDURAL HISTORY

On June 12, 2002, Plaintiffs, Truck Rail Handling, Inc. ("TRH") and Quality Transport, Inc. ("QTI") (collectively "Plaintiffs"), filed the instant action against Defendant The Burlington Northern and Santa Fe Railway Company ("BNSF"). On July 1, 2002, Plaintiffs filed their First Amended Complaint ("FAC") which is the operative pleading in this case. In the FAC, Plaintiffs allege that BNSF engaged in illegal tying and price fixing, violating 15 U.S.C. § 1 (hereinafter "Section 1") (FAC ¶¶ 64-65) and that BNSF conspired to monopolize and attempted to monopolize the market for loading and unloading of dry and liquid materials, violating 15 U.S.C. § 2 ("Section 2"). (FAC ¶¶ 67-68). Plaintiffs have since clarified that their theories of antitrust liability also rest on the concepts of "vertical foreclosure" and "coerced reciprocity." Plaintiffs also alleged causes of action for interference with contractual relations and misappropriation of trade secrets.

On August 7, 2002, BNSF answered and filed a counterclaim under Colorado law against TRH for trespass, relating to TRH's use and occupancy of BNSF property at Big Lift Colorado. On August 18, 2002, TRH answered the Counterclaim.

*Appendix B*

On November 14, 2003, BNSF filed its motion for summary judgment challenging each of Plaintiffs' theories of liability, except the conspiracy to monopolize claim because it believed that claim was abandoned. BNSF also moved for summary judgment on Plaintiffs' state law claims. On December 1, 2003, Plaintiffs filed their opposition and cross-motion for summary judgment seeking partial summary judgment on their antitrust claims, tortious interference claims, and on BNSF's counterclaim for trespass. (Docket No. 136, Plaintiffs' Notice of Motion and Motion for Partial Summary Judgment at 2.)

On December 6, 2004, this Court ordered the parties to submit further briefing addressing the question of whether the alleged restraints were horizontal restraints or vertical restraints. Pursuant to the Court's Order, the parties submitted supplemental briefing on that issue on December 13, 2004.

The motions are now fully briefed and ripe for decision.

The Court raises two preliminary matters. Plaintiffs' notice in support of their cross motion strongly suggests that they moved for summary judgment on the tortious interference claim but did not suggest they moved for summary judgment on the trade secrets claim. At the hearing on the cross-motions for summary judgment, however, Plaintiffs advised the Court that they did not intend to proceed on their state law claims. BNSF requests that the Court issue a formal ruling on those

claims. (*See* Jan. 23, 2004 Hearing Transcript ("Tr.") at 59:8-60:5.)

Because Plaintiffs indicated their intent to move for summary judgment on the tortious interference claim, and because they cited evidence and made arguments addressing that claim in their cross-motion, the Court shall rule on the tortious interference claim. However, because this is not true for the trade secrets claim, the Court denies BNSF's request to issue a formal ruling on that claim. Plaintiffs, therefore, are ORDERED to file a dismissal of the trade secrets claim within seven (7) days of this Order.

As stated, BNSF did not move on Plaintiffs conspiracy to monopolize claim because it believed Plaintiffs abandoned that claim. (BNSF Mem. at 4 n.4.) At the hearing on this motion, however, Plaintiffs advised the Court and BNSF that they intended to maintain the conspiracy claim. Although this Order may render that claim moot, the Court orders further briefing on this claim, as set forth in the conclusion of this Order.

## III. FACTUAL BACKGROUND

The following facts are not in dispute. TRH's primary business is "transloading" bulk commodities. (FAC ¶ 4; TRH Opp. at 7.) "Transloading is the process of transferring bulk material from a truck-trailer into a train freight car, or from a train freight car into a truck trailer." (FAC ¶ 8.) QTI is a trucking — or drayage - business, which transports "dry and liquid products via

specialized hopper and tanker trucks from the loading point to delivery site." (FAC ¶ 5.)

BNSF is a "Class I" freight railroad. (FAC ¶ 6; BNSF Amended Answer ¶ 6.) BNSF does not perform transloading services but instead relies on third parties to perform such services for its customers. BNSF also does not perform drayage service and uses drayage companies, such as QTI, to provide such services for its customers. (BNSF Evid. Kalb I Depo. at 18:13-19:3.)[1] Apart from other railroads, BNSF considers trucking companies to be its biggest competitors for its shipping business. (BNSF Evid. Garin Depo. at 36:4-37:4, Kalb I Depo. at 20:21-22, 21:8-13, Looney Depo. at 63:11 -64:4.)

It also is not disputed that, in order to provide transloading services to their customers, Plaintiffs require a terminal site to load and unload materials to or from train cars. A terminal consists of land and railroad tracks adjacent to, or a short distance from, the main train tracks and possesses certain characteristics as required by law to permit the safe loading and

1. Plaintiffs have attached their exhibits to a pleading entitled "Evidence in Support of Plaintiffs' Opposition to the Defendants' [*sic*] Motion for Summary Judgment and in Support of Plaintiffs' Motion for Partial Summary Judgment." BNSF has submitted its evidence separated by tabs identifying the deposition exhibit numbers and deposition testimony that correspond to the evidence. Thus, citations to Plaintiffs' evidence shall be cited for example as "TRH Evid. Ex. 3" or "TRH Evid. Schorno Depo. at 3:5". Similarly, citations to BNSF's evidence shall be cited "BNSF Evid. Ex. 32"or "BNSF Evid. Kalb I Depo. at 7:21".

unloading of dry and liquid, hazardous and non-hazardous materials. (FAC ¶ 10; BNSF Amended Answer ¶ 10.) BNSF owns such terminals and has leased space at those terminals to TRH. (FAC ¶¶ 15-18; TRH Evid. Ex. 90.)

There are over 400 transloading facilities that are accessible by BNSF rails, 133 of which are bulk transloading facilities. (TRH Evid. Ex. 114 at BNSF 004526; BNSF Evid. Kalb I Depo. at 5:14-25.) BNSF, however, owns the land and tracks for only 60 or 70 of those transloading facilities. It has access to the remainder because they are located on private property served by BNSF rails. (BNSF Evid. Ray Decl. ¶ 10, Kalb I Depo. at 6:11-13.) BNSF admits that a substantial amount of interstate and foreign commerce travels through its various terminal sites. (BNSF Amended Answer ¶ 14).

Until November 1, 2000, TRH conducted transloading services at BNSF's terminal in Big Lift, Colorado, where TRH leased a portion of BNSF's tracks and building space. (FAC ¶¶ 15, 35; BNSF Amended Answer ¶¶ 15, 35; BNSF Counterclaim ¶ 4; TRH Evid. Ex. 51.) Until February 2002, TRH also leased space at BNSF terminals in Vinton and Anthony, Texas, and Vado, New Mexico, to conduct transloading services. (FAC ¶¶ 16-18; TRH Evid. Ex. 90.) BNSF terminated TRH's lease at Big Lift in October 2000 and terminated the leases at Vinton, Anthony, and Vado effective February 28, 2002. (TRH Evid. Exs. 51, 90.)

*Appendix B*

In January 1992, TRH had entered into agreements, entitled "ATSF Bulk Terminal Services", with BNSF's predecessor the Atchison Topeka and Santa Fe Railroad, for terminals at El Paso, Texas and Vado, New Mexico.[2] The ATSF Bulk Terminal Services agreements were similar in nature to a Transload Service Drayage Agreement ("TSA"), which BNSF wanted to enter into with Plaintiffs. *(See* BNSF Evid. Exs. 32, 33; TRH Evid. Exs. 3,14.) The ATSF Bulk Terminal Services Agreement are not, however, identical to the TSA. (*See, e.g.*, TRH Evid. Ex. 4.) Both agreements provide that the railroads would pay Plaintiffs specific amounts "in consideration for the services to be provided" by Plaintiffs. The ATSF Bulk Terminal Services agreement provided that the compensation terms were set forth in a separate letter agreement, which has not been submitted as evidence. (BNSF Evid. Exs. 32, 33.) In the TSA, the compensation terms were based upon "mutually agreed rates and charges as provided in Exhibit B" to the TSA, which was incorporated into the TSA by reference. (*See* TRH Evid. Ex. 3.) The TSA provided attaches a "sample" Exhibit B. (*Id.*)

Shortly after BNSF Terminated TRH's lease at Big Lift, BNSF entered into a lease and a TSA with Savage Industries, Inc. (TRH Evid. Exs. 53, 54.) Savage now manages and provides transloading and related services at the Big Lift terminal. (TRH Evid. Exs. 51, 58, 67, 72; BNSF Counterclaim ¶ 12.) Other transloaders and truck

2. BNSF was created as a result of a merger between the Burlington Northern and the Atchison, Topeka and Santa Fe Railway Company. (*See, e.g.*, BNSF Evid. Kalt Report at p. 2,¶4.)

companies, including TRH, had access to the Big Lift terminal subject to certain conditions. (*Id.*)

Plaintiffs' antitrust allegations center around the TSA and the resultant consequences of Plaintiffs' refusal to enter into a TSA with BNSF in the time period between 2000 and 2002. Plaintiffs contend that BNSF terminated the leases at the Vinton, Anthony and Vado sites because Plaintiffs refused to enter into the TSA and that obtaining the leases was tied to execution of the TSA. (TRH Evid. Exs. 25, 26). For purposes of this motion, BNSF has assumed that fact to be true. (BNSF Mem. at 2 n.3).[3]

The parties dispute the following facts. Plaintiffs contend that BNSF's terminals are facilities essential to their business and that there are no other available terminals or alternative options near Big Lift, Vado, Anthony and Vinton where they can conduct their business. BNSF contends that there were alternative sites available to Plaintiffs, including terminal sites on the Union Pacific Railway ("UP"), at which Plaintiffs are operating. (*See* BNSF Evid. Schorno I Depo. at 7:11-9:17, 37:15-38:6.)

Plaintiffs also contend that through the TSA, BNSF bundles the prices for transportation, transloading, and

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3. There is, however, evidence in the record that suggests BNSF terminated the leases for other reasons, such as TRH's refusal to comply with safety requirements, failure to pay certain "demurrage" charges, and customer complaints. (BNSF Mem. at 2 n.3; *see also* TRH Evid. Exs. 72, 83.)

storage services provided to shippers who wish to ship materials on BNSF's routes. Plaintiffs contend that, as a result, BNSF controls what prices are offered and, thus, that it has conspired with transloaders who enter into TSA's to fix prices. BNSF contends that the transloaders actually determine what price will be charged for transloading services and that BNSF earns no revenue from the transloading charges and merely passes revenue through to the transloader. BNSF also contends that it offers both bundled and unbundled rates to shippers.

## IV. APPLICABLE LEGAL STANDARDS

### A. Legal Standards Applicable to Summary Judgment.

A principal purpose of the summary judgment procedure is to identify and dispose of factually unsupported claims. *Celotex Corp. v. Cattrett,* 477 U.S. 317, 323-24 (1986). Summary judgment is proper when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "In considering a motion for summary judgment, the court may not weigh the evidence or make credibility determinations, and is required to draw all inferences in a light most favorable to the non-moving party." *Freeman v. Arpaio,* 125 F.3d 723, 735 (9th Cir. 1997).

*Appendix B*

The party moving for summary judgment bears the initial burden of identifying those portions of the pleadings, discovery, and affidavits that demonstrate the absence of a genuine issue of material fact. *Celotex,* 477 U.S. at 323. An issue of fact is "genuine" only if there is sufficient evidence for a reasonable fact finder to find for the non-moving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248-49 (1986). A fact is "material" if it may affect the outcome of the case. *Id.* at 248.

A party moving for summary judgment who does not have the ultimate burden of persuasion at trial, must produce evidence which either negates an essential element of the non-moving party's claims or show that the non-moving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.,* 210 F.3d 1099, 1102 (9th Cir. 2000). A party who moves for summary judgment who does bear the burden of proof at trial, must produce evidence that would entitle him or her to a directed verdict if the evidence went uncontroverted at trial. *C.A.R. Transp. Brokerage Co., Inc. v. Darden,* 213 F.3d 474, 480 (9th Cir. 2000).

Once the moving party meets his or her initial burden, the non-moving party must go beyond the pleadings and by its own evidence "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). In order to make this showing, the non-moving party must "identify with reasonable particularity the evidence that precludes summary

judgment." *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996). It is not the Court's task to "scour the record in search of a genuine issue of triable fact." *Id.* (quoting *Richards v. Combined Ins. Co.*, 55 F.3d 247, 251 (7th Cir. 1995).[4] If the non-moving party fails to make this showing, the moving party is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 323.

### B. Legal Standards Applicable to Plaintiffs' Antitrust Causes of Action.

Section 4 of the Clayton Antitrust Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust law may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15.[5] Accordingly,

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4. The parties cite testimony and documents that are not included in the record. Any evidence not submitted to the Court has not been considered in ruling on these motions.

5. In the FAC, Plaintiffs also seek relief under 15 U.S.C. § 26, which provides that "[a]ny person, firm, corporation, or association shall be entitled to sue for an have injunctive relief, . . . against threatened loss or damage by a violation of the antitrust laws . . . ." (FAC ¶ 1.) That section also provides, however, that "nothing herein shall be construed to entitle any person, firm, corporation, or association, *except the United States, to* bring suit for injunctive relief *against any common carrier subject to the jurisdiction of the Surface Transportation Board under subtitle IV of title 49.*" 15 U.S.C. § 26 (emphasis added). Neither party has raised this issue; yet it appears

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to prevail on their Section 1 and Section 2 claims, Plaintiffs must establish: (1) a violation of an antitrust statute; and (2) an injury that was "of the type that the antitrust laws were intended to prevent and that flows from that which makes [BNSF's] acts" allegedly unlawful. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990).

### 1. Sherman Act Section 1 Claims.

Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce" is illegal. 15 U.S.C. § 1. By its terms, Section 1 focuses on concerted activity. *Alaska Airlines Inc. v. United Airlines, Inc.*, 948 F.2d 536, 541 (9th Cir. 1991). Thus, concerted action among two or more persons to restrain trade is critical to proving a Section 1 claim. *See, e.g., Fisher v. City of Berkeley*, 475 U.S. 260, 266 (1986) ("[T]here can be no liability under § 1 in the absence of an agreement."). In a tying claim, a contract between a buyer and a seller may satisfy this element of a Section 1 claim, if the seller utilizes the contract to coerce the buyer's acquiescence in a tying arrangement. *See, e.g., Datagate, Inc. v. Hewlett-Packard Co.*, 60 F.3d 1421, 1427 (9th Cir. 1995).

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undisputed that BNSF is a common carrier subject to the jurisdiction of the Surface Transportation Board. (*See, e.g.*, BNSF Mem. at 15:9-11). Accordingly, as a matter of law, Plaintiffs cannot obtain an injunction against BNSF on the first two causes of action.

Plaintiffs assert that BNSF has engaged in conduct that amounts to *per se* violations of Section 1. If, however, the alleged conduct is not deemed to be a *per se* violation of the antitrust laws, Plaintiffs must establish that the alleged agreements unreasonably restrain trade in the relevant market. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (noting that despite Section 1's express terms prohibiting any agreement that is in restraint of trade, the Supreme Court "has long recognized that Congress intended to outlaw only *unreasonable* restraints").

### 2. Sherman Act Section 2 Claims.

Section 2 of the Sherman Act provides that it is unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of" trade or commerce. 15 U.S.C. § 2. Unlike Section 1, Section 2 focuses on unilateral activity. *Alaska Airlines*, 948 F.2d at 541.

In order to prove a claim for attempted monopolization, a plaintiff must prove: "1) a specific intent to monopolize a relevant market; 2) predatory or anticompetitive conduct; and 3) a dangerous probability of success." *Id.* at 542.

## V. ANALYSIS

Plaintiffs contend that BNSF violated Section 1 by unlawfully tying its leases for transload facilities to the execution of the TSA. Plaintiffs also allege that BNSF

violated Section 1 by using the TSA to set the prices that Plaintiffs may charge their customers, including maximum prices for some services. Plaintiff posits that each of these alleged claims results in a *per se* violation of Section 1. (FAC ¶¶ 64-65.) Although "[p]rice fixing is the quintessential example of a *per se* violation of [section] 1, . . . [t]here are *some* price fixing arrangements that violate the letter of the Sherman Act but are legal nonetheless." *Dagher v. Saudi Refining Inc.*, 369 F.3d 1108, 1117 (9th Cir. 2004) (emphasis in original) [6]

Plaintiffs claim BNSF violated Section 2 by attempting to monopolize "the dry and liquid material unloading market," *i.e.* the market for transloading of bulk materials by, *inter alia*, denying them access to terminals, thereby depriving them of an essential facility. (FAC ¶¶ 67-68.) Plaintiffs also rely on the theories of "vertical foreclosure" and "coerced reciprocity" to support their attempted monopoly claim.[7]

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6. Plaintiffs requested leave to file the *Dagher* opinion pursuant to Northern District Civil Local Rule 7-3(d). Plaintiffs' request is GRANTED.

7. The Court concurs with BNSF that the "vertical foreclosure" theory of liability is, in essence, a "monopoly leveraging" theory of liability. The Ninth Circuit, however, has rejected the "monopoly leveraging" doctrine as an independent theory of liability under Section 2, concluding that "[i]f there is a dangerous probability that a monopoly will be created by leveraging conduct, then the conduct will be reached under the

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In the Ninth Circuit, in order to prevail on their Section 2 claims based on the essential facilities theory and the coercive reciprocity theory, Plaintiffs must establish that BNSF had monopoly power in an upstream market, and its conduct created a dangerous probability of a monopoly in a downstream market. *Id.* at 547.

### A. Plaintiffs Have Not Met Their Burden to Establish A Relevant Market.

In order to prevail on their antitrust claims of illegal tying and attempted monopolization under the essential facilities, vertical foreclosure, and coercive reciprocity theories, Plaintiffs must establish the relevant markets in which to evaluate BNSF's alleged market power. *See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459-60 (1993) (attempted monopolization); *Paladin*

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doctrine of attempted monopoly." *See Alaska Airlines*, 948 F.2d at 549. In that case, the Ninth Circuit noted that the "monopoly leveraging" theory of liability had its origins in the Second Circuit's decision in *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979). The *Alaska Airlines* court rejected monopoly leveraging, as articulated in *Berkey Photo*, as an independent theory of liability because it permitted a firm to be found liable for a Section 2 violation "even in the absence of an attempt to monopolize the leveraged market," and also failed to recognize the distinction between lawful natural monopolies and unlawful monopolies. *Alaska Airlines*, 948 F.2d at 547-548. As the Court is bound by the Ninth Circuit's decision in *Alaska Airlines*, it has evaluated Plaintiffs' claim of monopoly leveraging and vertical foreclosure theories under the rubric of attempted monopolization.

*Associates, Inc. v. Montana Power Company*, 328 F.3d 1145, 1163 (9th Cir. 2003) (essential facilities); *County of Tuolumne v. Sonora Community Hospital*, 236 F.3d 1148, 1157-1158 (9th Cir. 2001) (tying); *Catlin v. Washington Energy Co.*, 791 F.2d 1343, 1349 (9th Cir. 1986) (leveraging); *Betaseed, Inc. v. U and I Incorporated*, 681 F.2d 1203, 1216 (9th Cir. 1982) (coercive reciprocal dealing). Similarly, to the extent Plaintiffs' price fixing claims must be evaluated under a rule of reason, they must prove the agreements unreasonably restrained trade and harmed competition in the relevant market. *Khan*, 522 U.S. at 10.[8]

The definition of the relevant market generally is a factual question for the jury. That does not, however, always preclude summary judgment on this issue. If BNSF establishes that there is a lack of evidence to support Plaintiffs' case, and if Plaintiffs' evidence "cannot sustain a jury verdict on the issue of market definition, summary judgment is appropriate." *Rebel Oil Company, Inc. v. Atlantic Richfield Company*, 51 F.3d 1421, 1435 (9th Cir. 1995) (citing *Celotex*, 477 U.S. at 324-325).

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8. Plaintiffs maintain that by requiring a transloader to enter into the TSA, BNSF precludes the transloader from dealing directly with its customers and thereby fixes the prices for transloading services and also sets maximum trucking prices, which Plaintiffs claim results in vertical price fixing. *(See, e.g.,* TRH Supp. Br. at 2-3.)

*Appendix B*

## 1. Product Market.

Plaintiffs claims encompass two alleged product markets: (1) the market for leased transload facilities (the "upstream" market); and (2) the market for "transloading of bulk commodities" (the "downstream" market). "A product market includes the product at issue and its substitutes," and requires the Court to consider whether two products are reasonably interchangeable. *Independent Ink, Inc. v. Trident, Inc.*, 210 F. Supp. 2d 1155, 1168 (C.D. Cal. 2002) (citing, *inter alia*, *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962)). The focus of this inquiry is the product's "price, use and qualities." *United States v. Oracle Corporation*, 331 F. Supp. 2d 1098, 1131 (N.D. Cal. 2004) (quoting *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956)). Using these factors, two (or more) products may be considered "reasonably interchangeable," where there is cross-elasticity of demand, *i.e.* if customers would switch to alternatives in response to a price increase in the alleged monopolist's product. *Rebel Oil*, 51 F.3d at 1436; *see also AD/SAT, A Division of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 227 (2d Cir. 1999) (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966)) ("Cross elasticity of demand exists if consumers would respond to a slight increase in the product of one product by switching to another product."). Cross-elasticity of demand therefore focuses on the consumer side of the equation. To define a relevant product market, from the demand side, one must identify . . . the smallest possible group of competing products[.] . . .

> If a significant number of customers respond to a [small but significant non-transitory increase in price of the product at issue ("SSNIP")] by purchasing substitute products having a very considerable degree of functional interchangeability for [a hypothetical] monopolist's products, then the SSNIP would not be profitable.... Accordingly, the product market must be expanded to encompass those substitute products that constrain the monopolist's pricing. The product market is then expanded until the hypothetical monopolist could profitably impose a SSNIP.

*Oracle*, 331 F. Supp. 2d at 1112 (internal quotations and citations omitted).[9] *Accord Rebel Oil*, 51 F.3d at 1435 (to determine relevant market one looks to whether a consumer would switch to alternatives in response to an increase in price of alleged product).

In addition to examining cross-elasticity of demand, the alleged product market also must take into account "cross-elasticity of supply, which depends on the extent to which the producers of one product would be willing to shift their resources to producing another product in

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9. The Court recognizes that the *Oracle* case addressed the relevant market in the context of an alleged violation of Section 7 of the Clayton Act. However, the court's discussion of both the definition of a relevant product market and the means by which that market may be defined is equally applicable here. *See, e.g., Rebel Oil*, 51 F.3d at 1435-1436.

response to an increase in the price of the other product." *Rebel Oil,* 51 F.3d at 1436. "Inelastic supply in [an] alleged market can exist only if there are barriers to entry." *Morgan, Strand, Wheeler & Biggs v. Radiology, LTD,* 924 F.2d 1484, 1490 (9th Cir. 1991).

Plaintiffs contend that they have presented sufficient evidence of their proposed product markets and also assert that in evaluating whether they have met their burden to establish these product markets, the Court may consider more "practical indicia" such as "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers," as well as other factors. (Tr. at 23:19-24:21 (quoting *Brown Shoe,* 370 U.S. at 325-326).) Plaintiffs' argument that the Court may look to more "practical indicia" is flawed, however, because Plaintiffs' allegations against BNSF depend upon findings that transloading and leased transload facilities are distinct product markets, rather than submarkets. Thus, Plaintiffs cannot escape putting forth evidence regarding reasonable interchangeability of use to establish the relevant market.

A key component of the question of what products are "reasonably interchangeable" from the demand perspective is the identity of the purchasers of the product. Although much of Plaintiffs' argument and evidence focuses on what alternatives were available to them, the Court concludes that for the "transload services" market, shippers of bulk commodities are the

purchasers or ultimate end users of the alleged product. In regard to the "leased transload facilities" market, the Court considers transloaders to be the ultimate end users of that alleged product.

**a. The leased transload facilities market.**

Plaintiffs do not explicitly address what evidence supports their claim that a separate product market exists for "leased transload facilities." Plaintiffs' expert, William Tye, has evaluated reasonably interchangeable alternatives to leasing the Big Lift and Vado terminals and considered this alleged market from the perspective of both the supply side and the demand side. There is thus some evidence in the record, at least from Plaintiffs' perspective if not from other transloaders' perspectives, to support the existence of this alleged product market. (*See* BNSF Evid. Tye Expert Report at 29-34.)

BNSF contends, however, that the undisputed evidence demonstrates that it has no market power in this alleged product market, because it only owns - and therefore only leases out – approximately 13-16 percent of the transload facilities in the BNSF system. (BNSF Mem. at 5 (citing BNSF Evid. Kalb I Depo. at 5-7.) BNSF does not, however, address what percentage of transload facilities it owns and leases within the alleged geographic markets. Thus, assuming that Plaintiffs have met their burden to show that the market for "leased transload facilities" is a relevant product market for antitrust purposes, BNSF's assertion that it only owned

13-16 percent of transload facilities leased to transloaders would not necessarily lead to the conclusion that it lacked market power in this market, entitling it to judgment.

Even if Plaintiffs were able to establish that the "leased transload facilities" is a relevant product market for antitrust purposes, Plaintiffs' tying, price fixing, and attempted monopolization claims against BNSF still fail because Plaintiffs have not presented sufficient evidence to prove that the alleged market for "transloading of bulk commodities" is a relevant market for antitrust purposes.

**b. The "transloading of bulk commodities" market.**

BNSF contends that Plaintiffs failed to meet their burden to establish that transloading of bulk commodities is the relevant product market because there is unrebutted evidence that all truck shipment of goods is available as an alternative to transloading. (BNSF Mot. at 5:12-17; Tr. at 22:13-15.) BNSF also contends that even assuming transloading bulk commodities is a distinct product market, Plaintiffs have insufficient evidence to establish that definition at trial. (Tr. at 14:13-22:15.) BNSF attacks Plaintiffs' reliance on expert testimony to support their definition of this proposed product market asserting that the experts have not conducted an economic analysis regarding cross-elasticity of supply or demand. (Tr. at 22:12-13.)

*Appendix B*

As support for their claim that transloading of bulk commodities is a relevant product market, Plaintiffs point the Court to a number of BNSF's internal documents. (*See generally* Tr. at 6:13-13:25.) For example, Plaintiffs contend that a BNSF document entitled "Major Transload Markets 2001-2002" demonstrates that BNSF viewed transloading as a product market. Plaintiffs similarly rely on an e-mail that states "[t]here are four transloaders ready willing and able to . . . set up operation . . . with their self loaders to transload plastics." (TRH Evid. Ex. 11). Plaintiffs also contend that a market for transloading of bulk commodities is evidenced by a BNSF document entitled "Extended Services – A BNSF Growth Engine", in which BNSF discusses transloading bulk commodities as a "market". (TRH Evid. Ex. 36 at, *e.g.*, BNSF 012670, 012675.) Finally, Plaintiffs refer the Court to another BNSF e-mail string, in which various persons are referred to as "transload" experts. (TRH Evid. Ex. 92.) The content of this e-mail string suggests that BNSF had concerns that Stagecoach, a transloader that replaced TRH at the El Paso facility, might end up with a "'monopoly'" in the El Paso marketplace and that Stagecoach had the "the potential to leverage [BNSF] against the UP." (*Id.* at BNSF 009529; *see also id.* at BNSF 009529 ("I echo Paige's concerns on Stagecoach's monopoly in this area.")[10]

10. Plaintiffs contend that this e-mail exchange demonstrates that *BNSF* created a monopoly in the El Paso transloading market by granting Stagecoach exclusive rights to provide transloading services at BNSF's El Paso facility. (Cont'd)

Although these documents may indeed show that BNSF viewed transloading bulk products as a distinct product market, these documents alone are insufficient to create an issue of material fact regarding the definition of a relevant product market. These documents do not discuss what substitutes are available to shippers, and whether shippers would be able to constrain an increase in prices by switching to reasonable alternatives. Nor do these documents evaluate whether or not other producers could enter the market to provide alternatives to shippers. Simply stated, these internal BNSF documents do not assist in evaluating cross-elasticity of supply and demand. *Independent Ink,* 210 F. Supp. 2d at 1170. These documents, instead, merely reflect "laymen's comments made in a competitive business environment." *Id.* (quoting *AD/SAT, A Division of Skylight Inc. v. Associated Press,* 920 F. Supp. 1287, 1297 n.7 (S.D.N.Y. 1996), *aff'd* 181 F.3d 216 (2d Cir. 1999)).

Plaintiffs also lack expert testimony supporting the existence of an antitrust product market for transloading of bulk commodities. For example, in his expert report, Dr. Tye acknowledges the general principles set forth above regarding the cross-elasticity of supply and demand of product substitutes. (BNSF Evid. Tye Report at 29.)[11] However, the remainder of his report operates

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(*See* Tr. at 12:6-10.) For the reasons set forth herein, this evidence does not create a disputed issue of material fact on the issue of the relevant product market.

11. Although BNSF filed separate motions to strike the Tye and Burris reports, it has included these reports as evidence in

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under the general assumption that the relevant product market is "leased transload facilities". (*See, e.g.*, BNSF Evid. Tye Re ort at 30:15-18, 31:16-34:17.) Moreover, Dr. Tye focuses on the alternatives available to Plaintiffs. Such an analysis, however, flies in the face of the well established principle that the antitrust laws are designed to protect "competition, not competitors". *Atlantic Richfield,* 495 U.S. at 338 (quoting *Brown Shoe,* 370 U.S. at 320).

To the extent Dr. Tye's report can be read as support for Plaintiffs' proposed "transloading of bulk commodities" market, the report clearly states that he *did not* evaluate possible substitutes for transloading of bulk commodities, viewing them instead as possible "efficiency defenses" to Plaintiffs' claims. (*Id.* at 27:13-18: "BNSF . . . denies that it has market power. . . . For example, the rail carrier in the above hypothetical example *might point to the availability of possible other transloading terminals at B or the possibility of an all truck-movement between A and B.*" (emphasis added).)[12] Furthermore, Dr. Tye's conclusions seem to contradict

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support of its motion. Because BNSF relies on these reports to argue why its motion should be granted, the Court has considered them for purposes of ruling on the motions.

12. Although the Court does not rest its conclusions on the following point, it is cognizant of the fact that Dr. Tye confirmed this fact in his deposition when he admitted that he did not evaluate cross-elasticity of demand or supply for *any* proposed market. (*See* Docket No. 121, BNSF Motion to Strike Expert Report of Dr. William Tye, Tye Depo. at 168:11-15.)

Plaintiffs' assertion that the transloading of bulk commodities is a separate product market. Dr. Tye opines that "[f]rom the point of view of the customer, transloading may provide a significant benefit *in creating additional shipping options*. . . . Customers with access to only one railroad at either the origin or destination can also benefit by threatening the carrier with the option of transloading to or from a competitive rail option." (BNSF Evid. Tye Expert Report at 12 (emphasis added).)

Plaintiffs did submit evidence that customers would have preferred to continue to work with them. (*See, e.g.*, TRH Evid. Wicklander Depo. at 62:1-3.) There is also evidence in the record which purports to explain why some of Plaintiffs' customers might have been unable to switch to a new location to continue working with Plaintiffs after BNSF terminated Plaintiffs' leases at Big Lift and Vado. (TRH Evid. Burris Report at 14-15.) Plaintiffs, however, have put forth no evidence – expert or otherwise – as to what shippers in general would have done had they been faced with a small but significant non-transitory increase in prices for transloading services, *i.e.* there is no evidence regarding the costs to consumers of switching to a substitute for transloading, such as all truck delivery, if the price of transloading services increased. *See, e.g., Oracle*, 331 F. Supp. 2d at 1131-1132 (customer testimony regarding how they would respond to a 10% price increase in alleged product market, that was not backed up with economic analysis or data to support contentions, found insufficient to establish product market).

*Appendix B*

Taking all facts and reasonable inferences therefrom in the light most favorable to Plaintiffs, Dr. Tye's opinions and report, taken alone or in combination with BNSF's internal documents, are not sufficient to establish a product market in this case. *See, e.g., Oracle,* 331 F. Supp. 2d at 1134 (rejecting expert testimony as proof of product market where expert had not claimed to have performed economic study of alleged product market).[13]

BNSF has compellingly demonstrated that Plaintiffs lack evidence to establish at least one of the relevant product markets, which constitute an essential element of each of Plaintiffs' antitrust claims, for without establishing a relevant product market, Plaintiffs cannot establish BNSF's alleged power in that market. Plaintiffs, in response, have not met their burden of "identify[ing] with reasonable particularity the evidence that precludes summary judgment," and it is not this Court's responsibility to scour the record for such evidence. *Keenan,* 91 F.3d at 1279. For this reason, as well as for the reasons set forth in the remainder of this Order, BNSF is entitled to judgment in its favor on

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13. The deadline imposed upon the parties for concluding expert discovery was October 6, 2003. BNSF's motion for summary judgment was filed on November 14, 2003. BNSF in its briefing put Plaintiffs on notice that BNSF believed Plaintiffs' expert testimony on the alleged product market was deficient. At no point in these proceedings, however, have Plaintiffs contended or provided evidence that Dr. Tye in fact evaluated the alleged product markets in the context of cross-elasticity of supply and demand. The Court can only conclude from this failure that no such evidence exists.

Plaintiffs' Section 1 tying and price fixing claims, and Plaintiffs Section 2 attempted monopolization claims on all theories asserted by Plaintiffs.

**2. The relevant geographic market.**

"A geographic market is an area of effective competition where buyers can turn for alternate sources of supply." *Morgan, Strand,* 924 F.2d at 1490 (internal quotations and ellipsis omitted) (citing *Oltz, Moore v. Jas. H. Matthews & Co.,* 550 F.2d 1207, 1218 (9th Cir. 1977)). *See also Independent Ink,* 210 F. Supp. 2d at 1171 (the geographic market is the "market area in which the seller and its competitors operate and consumers 'can practicably turn for supplies.'" *Id.* (quoting *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 357 (1963)). Plaintiffs contend that the relevant geographic markets are El Paso, Texas, Denver, Colorado, and Stockton, California.

In the *Independent Ink* case, the court noted that the definition of the relevant geographic market should be established by analyzing "price data and such corroborative factors as transportation costs, delivery limitations, customer convenience and preference, and the location and facilities of other" entities providing the product or service at issue. *Id.*

Plaintiffs again rely on a number of BNSF internal documents to support their definition of the relevant geographic markets. (TRH Opp. at 7-8; Tr. at 6:11-14). For example, Plaintiffs rely on the BNSF document

entitled "Major Transload Markets" to demonstrate that Denver, El Paso and Stockton are the relevant geographic markets. (TRH Evid. Ex. 85.) Similarly, Plaintiffs rely on an agenda for a meeting between TRH and BNSF to support their definition of the relevant geographic markets. (Tr. at 91-15; TRH Evid. Ex. 10.) Finally, Plaintiffs point to e-mails and a facsimile cover sheet outlining areas that BNSF planned to institute its "Quality Bulk Network" program, to support their definition of the proposed geographic market. (TRH Evid. Exs. 11, 16, 92).

The Court concludes these exhibits are insufficient to establish the geographic market. The documents do not assist in evaluating "price data and such corroborative factors as transportation costs, delivery limitations, customer convenience and preference, and the location and facilities of other" entities providing the product at issue. *Independent Ink*, 210 F. Supp. 2d at 1171. Rather, these documents merely identify particular geographic areas in which some entities may compete. That fact, however, does not necessarily lead to the conclusion that such a geographic range is the relevant geographic market for antitrust purposes. *Morgan, Strand*, 924 F.2d at 1490.

Accordingly, Plaintiffs have failed to establish another essential component of the relevant market. For this reason as well, BNSF is entitled to judgment in its favor on Plaintiffs' Section 1 tying and price fixing claims and Plaintiffs' Section 2 attempted monopolization claims on all theories asserted by Plaintiffs.

**B. Plaintiffs' "Tying" Claim Also Fails Because PIaintiffs Were Not Compelled to Purchase Services from BNSF.**

In addition to the fact that Plaintiffs tying claim fails because they have failed to establish that the market for "transloading bulk commodities" is a relevant product market for antitrust purposes, Plaintiffs' tying claim also fails because there is no evidence that they were compelled to purchase anything from BNSF.

Tying arrangements are traditionally defined as "'an agreement by a party [the buyer] to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.'" *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 461-462 (1992). In order to prevail on a traditional tying claim, a must establish: "(1) that there exist two distinct product or services in different markets whose sales are tied together; (2) that the seller possesses appreciable economic power in the tying product market sufficient to coerce acceptance of the tied product; and (3) that the tying arrangement affects a 'not insubstantial volume of commerce' in the tied product market." *Paladin*, 328 F.3d at 1159 (citing *Eastman Kodak*, 504 U.S. at 461-462 (quoting *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5-6 (1958)).

Plaintiffs do not however allege that BNSF used its alleged power in the leased transload facilities market to coerce shippers into purchasing transloading bulk

commodities from BNSF. Rather, Plaintiffs contend that BNSF ties its leases to the execution of the TSA, which purportedly requires Plaintiffs to *sell* their transloading services to BNSF. The Court recognizes that Plaintiffs also contend that BNSF used the TSA to offer bundled pricing to shippers, however the Court does not find this fact to be material to the tying claim. Under Plaintiffs' theory, in tying parlance it is the TSA that is the "tied" product and the lease is the tying product. In addition to the fact that Plaintiffs have never argued that the TSA is a distinct product for antitrust purposes, they have not put forth any evidence from which a reasonable jury could determine that a product market exists for such an agreement. Moreover, as is evident, Plaintiffs assert not that they were coerced into purchasing a product from BNSF but rather that they were allegedly coerced to "to *sell* services to the Defendant, whether they wanted to or not, at prices dictated by the Defendant." (TRH Supp. Brief at 3.)

These facts are similar to the facts presented in *49er Chevrolet, Inc. v. General Motors Corp.*, 803 F.2d 1463 (9th Cir. 1986). In that case, the plaintiffs alleged that GM required them to perform warranty services for GM, for which GM compensated the plaintiffs at precise amounts (the tied product) in order to keep their GM dealership franchises (the tying product). *49er Chevrolet*, 803 F.3d at 1469. The court concluded that GM's requirement did not "meet existing definitions of an unlawful tie-in," because the plaintiffs "are not buyers of an allegedly tied product at all, but are sellers." *Id.* This Court concludes that, like the arrangements in

the *49er Chevrolet* case, a requirement by BNSF that Plaintiffs, or other transloaders, who wish to maintain their leases enter into a TSA, is not an unlawful tying arrangement, because the transloaders are "not buyers of an allegedly tied product at all, but are sellers." *Id.*

Plaintiffs rely heavily on *International Salt Co. v. United States*, 332 U.S. 392 (1947) and *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958) to support their claim that BNSF has violated the antitrust laws by tying its leases to the TSA. These cases, however, do not support Plaintiffs' claims because they involve traditional tying arrangements. For example, in the *International Salt* case, the defendant used its leases for certain machines to require the plaintiff to purchase from it the salt used in those machines. Similarly, in *Northern Pacific Railway*, the defendant used its power in the market for land to require a party leasing or purchasing that land to use defendant's railway lines to route their freight, restricting the plaintiffs' ability to purchase services from another railroad.

Accordingly, the Court concludes that the alleged requirement that Plaintiffs sign a TSA in order to obtain or maintain a lease for the transloading facilities in question does not constitute a traditional "tying" arrangement prohibited by the antitrust laws, and BNSF is entitled to judgment on the tying claim for this reason as well.

### C. Plaintiffs' Horizontal Price Fixing Claim Also Fails Because There Is No Evidence That BNSF Dictates Prices.

Plaintiffs contend that BNSF's use of the TSA is also anticompetitive because BNSF uses the TSA to fix prices for both bundled and unbundled services, resulting in a horizontal price restraint. (TRH Opp. at 9, 23; TRH Supp. Br. at 2.)[14] It is undisputed that Plaintiffs and BNSF are not direct competitors, in that BNSF does not itself provide transloading services to consumers and instead contracts with transloaders, such as TRH, Savage or Stagecoach to provide those services. Plaintiffs, however, present evidence from which a jury reasonably could infer that by offering "bundled" services, BNSF viewed itself to be in competition with independent operators who offered similar services on a non-bundled basis. (TRH Evid. Ex. 97, Looney Depo. at 70:15-71:9.) Thus, there is some evidence from which a jury reasonably could infer that the alleged price fixing arrangement operated on a horizontal basis. The question this Court must determine is whether Plaintiffs have presented sufficient evidence to establish that BNSF's used the TSA to engage in illegal price fixing.[15]

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14. As noted in Section V.A., Plaintiffs also alleged that BNSF's use of the TSA resulted in vertical price fixing, a claim that fails because Plaintiffs failed to establish a relevant market in which BNSF unreasonably restrained competition through use of the alleged vertical price restraints.

15. Of course, it is also undisputed that Plaintiffs never entered into a TSA with BNSF, seriously undermining any assertion that as to their price fixing claims, they suffered antitrust injury by reason of this agreement.

*Appendix B*

The Court concludes that Plaintiffs have not presented sufficient evidence to show BNSF actually set the prices of transloading services in the TSA or impinged upon any transloader's freedom to set their own prices. "The crux of any price-fixing agreement is the relinquishment by a trader . . . of the freedom to set prices in accordance with his own judgment." *Chisolm Brothers Farm Equipment Co. v. International Harvester Company,* 498 F.2d 1137, 1142 (9th Cir. 1974).

The TSA provides in pertinent part:

> *Compensation.* In consideration for the services to be provided by Contractor hereunder, BNSF shall pay Contractor the *mutually agreed* to rates and charges as provided in Exhibit B attached hereto and incorporated herein by this reference. . . .

(BNSF Evid. Ex. 2 at 2 (emphasis added).)[16]

The terms of the TSA state that the parties would "mutually" agree to the rates that BNSF would pay a transloader for its services. Plaintiffs contend, however,

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16. BNSF does not dispute that it used the prices quoted by persons entering into the TSA to create bundled pricing bids to BNSF customers. (*See, e.g.,* BNSF Mem. at 27:5-7; BNSF Evid. Schorno I Depo. at 110:1-25.) The TSA, therefore, cannot be classified simply as an agreement between a buyer and a seller about the terms on which they will do business with one another, which would not necessarily violate Section 1. *See, e.g, 49ers Chevrolet,* 803 F.2d at 1468.

that BNSF actually dictates the prices that are to be charged and thus used the TSA to fix the prices that Plaintiffs may charge their customers. Again, Plaintiffs never actually entered into a TSA with BNSF. Although, the evidence on which Plaintiffs rely may suggest that BNSF could have tried to use bundled pricing to control a transloader's behavior or to obtain additional business, (*see, e.g.*, TRH Evid. Exs. 61, 72.), such evidence is directed more to Plaintiffs' claims that BNSF has used the TSA in an attempt to monopolize the market for transloading bulk commodities, which for the reasons discussed above in Section V.A.2, is a claim that must fail. This evidence is not material to Plaintiffs' horizontal price fixing claim because it does not create an inference that BNSF dictated what prices were to be charged for the services rendered by transloaders.

Indeed, Mr. Schorno's testimony flatly contradicts that position. Mr. Schorno testified that his understanding of the terms of the TSA was that BNSF was asking Plaintiffs to quote the prices they would charge for transloading and drayage services. (BNSF Evid. Schorno I Depo. 103:6-10, 104:6-13.) Mr. Schorno also testified that BNSF may have provided some suggested prices and requested that TRH provide it with competitive prices. (*Id.* at 106:6-14, 107:7-17). These facts alone cannot establish that BNSF used the TSA to "impinge [Plaintiffs'] independent pricing discretion." *Chisolm Brothers*, 498 F.2d at 1143 (concluding that where plaintiff was able to set its own prices and where defendants merely exhorted plaintiff to meet the competition, there was insufficient evidence to support

a price fixing claim). In addition, it is an undisputed fact that TRH entered into the "ATSF Bulk Terminal Services" agreement with the Santa Fe railroad. That agreement has similar, albeit not identical, terms regarding compensation for bundled services and states that "[i]n consideration for the services to be provided by Contractor (TRH) hereunder, Santa Fe shall pay Contractor as provided by separate letter agreement." (BNSF Evid. Exs. 32, 33.) Thus, like BNSF's TSA, the ATSF Bulk Terminal Services called for an agreement between TRH and Santa Fe on the pricing for transloading services. TRH has not suggested, however, that this agreement violated that antitrust laws.

Finally, Plaintiffs' allegations that BNSF used the threat of cancellation of its leases to coerce Plaintiffs (albeit unsuccessfully) to enter into a TSA do not save their price fixing claims. For this reason, Plaintiffs' reliance on *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964) is misplaced. In the *Simpson* case, the evidence demonstrated that the defendant used its leases for its retail outlets to coerce the plaintiff into maintaining the prices it – the defendant – set thereby impinging on its lessees' and potential lessees' right to set their own pricing. Here, Plaintiffs have put forth no evidence that, if Plaintiffs signed a TSA (which they did not), BNSF would be the entity to determine the applicable prices for Plaintiffs' services. Simply stated, there is no evidence in the record from which a reasonable jury could conclude that BNSF used the TSA to dictate or maintain the prices to be charged for transloading services in violation of the antitrust laws.

For these reasons as well, BNSF is entitled to judgment in its favor on Plaintiffs' price fixing claims.

### D. Plaintiffs Have Not Established a Genuine Issue of Material Fact Exists on Their Claim for Tortious Interference.

Plaintiffs asserted a claim against BNSF for tortious interference with contractual relationships. In order to prevail on these claims under Texas law, TRH must establish: (1) the existence of a contract; (2) the occurrence of a willful and intentional act of interference by the defendant; (3) actual damages or loss to the plaintiff; and (4) that defendant's act proximately caused plaintiff's damages. *Taylor v. Russell*, 181 F. Supp. 2d 668, 672 (E.D. Tex. 2001). A defendant's conduct must be independently tortious or unlawful. *Wal-Mart v. Sturges*, 52 S.W.3d 711, 713 (Tex. 2001). "The person who interferes with the contract cannot be a party to the contract." *Id.*

Similarly, under Colorado law, to prevail on a claim for intentional interference with contractual relations, a plaintiff must prove: (1) it had a valid contract with a third party; (2) the defendant intentionally and improperly interfered with that contract, causing the third party not to perform under the contract; and (3) that the defendant's conduct caused plaintiff's damages. *American Express Financial Advisors, Inc. v. Topel*, 38 F. Supp. 2d 1233, 1241 (D. Colo. 1999). Again, the defendant's conduct in interfering with the contract must be improper for some reason other than the actual

interference with the contract. *Nutting v. RAM Southwest, Inc.*, 106 F. Supp. 2d 1121, 1129 (D. Colo. 2000). Again, the person alleged to have interfered with the contract, cannot be a party to the contract. *Colorado Nat'l Bank of Denver v. Friedman*, 895 P.2d 159, 170 (Colo. 1993).[17]

In opposition to BNSF's motion, and in support of its own motion, Plaintiffs assert that BNSF "contacted Plaintiffs' customers and advised them to transfer to Plaintiffs' competitors, and also advised them that the Plaintiffs' would not be able to use the leased property . . . ." (TRH Opp. at 30:7-10.) The only apparent evidence in support of this claim is deposition testimony from Mr. Wicklander of Safety Kleen, one of Plaintiffs' customers, which also is one of BNSF's customers. (*See* TRH Mem. at 18:4-12 (citing TRH Evid. Wicklander Depo. at 25); TRH Evid. Exs. 51, 58.) Apart from Safety Kleen, Plaintiffs have not identified any other customers with whom BNSF allegedly interfered. In addition, Plaintiffs' own evidence supports BNSF's contention that it only contacted its own customers, one of whom was Safety Kleen, to advise them of the change in transloaders at the facilities. (TRH Evid. Exs. 51, 58.) There is no evidence in the record, however, to create a genuinely disputed issue of material fact that BNSF's actions in

17. Plaintiffs initially asserted these state law causes of action under California law. However, the Court previously determined that they should be addressed under Texas and Colorado state law. (*See* Docket No. 113, Order Granting Motion to Have This Court Determine Applicable Law.)

this regard were independently wrongful. *Wal-Mart*, 52 S.W.3d at 713; *Nutting*, 106 F. Supp. 2d at 1129.

Plaintiffs have failed to meet their burden on this claim, and BNSF is entitled to judgment as a matter of law in its favor.

**E. BNSF Has Not Met Its Burden to Create A Genuine Issue of Material Fact on its Trespass Claim.**

Under Colorado law, to establish its claim for trespass, BNSF must establish "a physical intrusion upon the property of another without the proper permission from the person legally entitled to possession of that real estate." Plaintiffs moved for summary judgment on Plaintiffs' trespass claim, citing a letter which purports to give Plaintiffs access to the Big Lift terminal. (TRH Evid. 67.) This letter provides sufficient evidence to negate an essential element of BNSF's claims. In response, BNSF contends that Plaintiffs were "initially authorized to continue transloading at Big Lift if [they] paid Savage a management fee," and that Plaintiffs refused to pay this fee. As such, BNSF claims Plaintiffs' authorization to continue transloading at Big Lift was revoked. (BNSF Reply Mem. at 18:7-10). In support of this contention, BNSF cites deposition testimony that has not been included in the record. (*Id.* citing Savage Depo. at 61-62.) As the party who will bear the burden of proof on this issue at trial, BNSF must produce evidence that would entitle him or her to a directed verdict if the evidence went uncontroverted at

trial. *C.A.R. Transp. Brokerage Co.*, 213 F.3d at 480. BNSF has failed to meet its burden, and Plaintiffs are entitled to summary judgment in their favor on BNSF's counterclaim for trespass.

## VI. CONCLUSION

For the foregoing reasons, Plaintiffs' motion for partial summary judgment is DENIED as to its antitrust claims. Plaintiffs' motion is GRANTED on BNSF's counterclaim for trespass and a partial judgment in Plaintiffs' favor shall be entered on that claim. BNSF's motion for summary judgment is GRANTED as to all claims raised in that motion.

The Court HEREBY ORDERS further briefing from the parties on the conspiracy to monopolize claim, which shall include argument as to whether Plaintiffs' conspiracy claim survives in light of their failure to prove the relevant market. The parties' further briefs shall not exceed ten pages. To the extent the briefs refer to evidentiary materials previously submitted, the parties may refer to their previously filed evidentiary submissions and need not re-file those exhibits or deposition excerpts. BNSF shall file its brief by no later than April 8, 2005. Plaintiffs shall file their brief by April 15, 2005. BNSF may file any reply brief by April 22, 2005.

The parties also shall appear for a case management conference on April 29, 2005, at 1:30 p.m. to discuss the manner in which this case should proceed in the event the Court concludes that Plaintiffs' conspiracy to

monopolize claim survives. The parties shall submit a joint case management conference statement by no later than April 22, 2005, and shall meet and confer to address the question of what further ADR efforts would prove useful to the parties. **IT IS SO ORDERED.**

Dated: March 8, 2005

/s/ Jeffrey S. White
JEFFREY S. WHITE
UNITED STATES DISTRICT JUDGE

## APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING FILED AUGUST 24, 2007

## UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 05-16552

D.C. No. CV-03-02825-JSW

TRUCK-RAIL HANDLING, INC.;
QUALITY TRANSPORT, INC.,

Plaintiffs - Appellants,

v.

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY,

Defendant - Appellee.

### ORDER

Before: SCHROEDER, Chief Circuit Judge, CANBY and FERNANDEZ, Circuit Judges.

The panel, as constituted above, has unanimously voted to deny the petition for panel rehearing. Chief Judge Schroeder has voted to deny the petition for rehearing en banc, and Judges Canby and Fernandez have so recommended.

*Appendix C*

The petition for en banc rehearing has been circulated to the full court, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for panel rehearing and the petition for rehearing en banc are DENIED.